INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	12
Appendix A	13
Appendix B	15

CITATIONS

Cases:

Bankers Life and Casualty Co. v. *Holland*, 346 U.S. 379	8
Ex parte Fahey, 332 U.S. 258	7, 9
Roche v. *Evaporated Milk Assn.*, 319 U.S. 21	7
United States v. *Apex Distributing Co.*, 270 F. 2d 747	5
United States v. *Blue*, 384 U.S. 251	10
United States v. *Celestine*, 215 U.S. 278	10
Will v. *United States*, 389 U.S. 90	6, 7, 9, 10

Statutes and rule:

18 U.S.C. 371 and 2071	2
18 U.S.C. 3731	5, 7, 10, 11
50 U.S.C. App. 462(a)	2
Rule 21, F.R. App. P	6

372-833—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE MYRON L. GORDON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the court of appeals, entered on November 26, 1969, in the above case.

OPINIONS BELOW

The orders of the court of appeals (Appendix A, *infra*, pp. 13–14) and of the district court (Appendix B, *infra*, pp. 15–16) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the exceptional circumstances of this case, mandamus was an appropriate remedy for the government regardless of the availability of an appeal.

2. Whether the court of appeals was correct in determining that respondent's decision dismissing the indictment against certain defendants was appealable to this Court.

STATEMENT

A three-count indictment filed on October 17, 1968, in the United States District Court for the Eastern District of Wisconsin, charged the ten defendants and five others with conspiracy to mutilate and destroy records of the Selective Service System and to interfere with the administration of the Selective Service Act (count 1) and the completed substantive acts (counts 2 and 3), in violation of 18 U.S.C. 371 and 2071, and 50 U.S.C. App. 462(a). The incidents giving rise to the indictment occurred on September 24, 1968. The defendants, known collectively as the "Milwaukee 14," received extensive publicity in the news media, much of it adverse and highly inflammatory. At one point a Milwaukee newspaper survey revealed that 97 per cent of those polled had heard of the Milwaukee 14, more than 60 per cent indicated a belief that the defendants were motivated by a desire to cause trouble, and 38 per cent felt that their acts were part of a nation-wide conspiracy. (A. 7–9.)

In April 1969, one of the defendants not involved in the present proceedings sought and received a change of venue on the ground that the hostile publicity had created a prejudice in the community of such intensity that he was unable to receive a fair trial. Believing that the community hostility extended throughout the state of Wisconsin, respondent, Judge Gordon, transferred that defendant's cause to the Northern District of Illinois. *United States* v. *Hagedorn*. (A. 10–11.)

Trial of the ten defendants involved herein was set for June 9. On June 2, they filed a motion to dismiss the indictment, alleging that the hostile publicity in the news media had not diminished since April, but had increased as a result of trials in the state court for offenses arising out of the same incident (burglary, larceny and arson). In their written motion the defendants claimed that they still could not be guaranteed a trial by an impartial jury. In addition they specifically refused to waive any rights regarding speedy trial or trial in the district. (A. 12–13.) On June 4, respondent denied the motion, indicating that, while there was much community prejudice against the defendants, he nevertheless would make an attempt to select an impartial jury. (A. 14–15.)

Jury selection began on June 9. By June 11, respondent had interviewed 141 prospective jurors, and had excused all but 28. From this voir dire respondent concluded that the community hostility was still broadly based, and that an impartial jury could not

be empaneled. He discussed his findings with the United States Attorney and examined the procedural approaches available in such a situation: change of venue, continuance, or additional voir dire. Respondent stated that he was powerless to move the case to another venue in view of the defendants' insistence that they be tried in the district (Dismissal Tr. 3).[1] The second option, continuance, was also rejected because of the prior demand for a speedy trial. Respondent added that "there never has been any occasion or opportunity for a delay beyond the time of the trial * * *" (Dismissal Tr. 4).

The final alternative, additional voir dire, was deemed to be futile in the light of the experience with the prospective jurors already interviewed. Of this group, only one had never heard of the Milwaukee 14, and one other had first heard of them upon coming to court. Although one out of every four or five declared that he was free of bias, Judge Gordon felt that he could not agree with those assessments. He believed that most of the jurors professing impartiality had had prior experience and had gained a measure of sophistication to the extent of knowing what answer was the correct one to make to the court's inquiries. Respondent added to these considerations the recent revival of publicity as a result of the state trials, and the general awareness of practically every juror of the convictions arising from the state action. He evidently decided that he could not trust a trial even to those jurors who claimed to

[1] The four-volume transcript of the voir dire is cited as "Tr." A separate one-volume transcript containing the dismissal of the indictment is cited as "Dismissal Tr."

be impartial, if they were familiar with some of the background of this case or the state trials. He remarked that a jury composed of individuals unaware of the Milwaukee 14 would not represent a cross-section of the community; each such juror would have had to be "a hermit or a recluse or a person who is shut out from life" (Dismissal Tr. 5). Although he acknowledged that the government was blameless as to publicity and recognized that the conduct of the defendants might have contributed largely to the community hostility, respondent ruled that the circumstances dictated that there be no trial. Accordingly, respondent dismissed the indictment, over the objection of the United States Attorney that the result reached was "very unjust to the government" (Dismissal Tr. 15).

Thereafter, the government filed with the Court of Appeals for the Seventh Circuit a petition for a writ of mandamus, to direct respondent to vacate his dismissal of the indictment as an arbitrary and clearly erroneous decision. In separate replies, respondent and defendants denied any error in the dismissal; moreover, they argued, mandamus was unavailable because the government could appeal the decision to this Court,[2] since it sustained a plea in bar where no jeopardy had attached (18 U.S.C. 3731). In a supplemental memorandum requested by the court of appeals on the question of appealability, the government

[2] Notices of appeal both to the court of appeals and to this Court were timely filed. All parties agree, however, that no appeal lies to the Seventh Circuit. See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9).

asserted that the setting of this case was so extraordinary and unprecedented that it was appropriate for mandamus whether or not an appeal was also available. This was so particularly because a writ of mandamus is given priority over other actions (Rule 21 (b), F.R. App. P.), and a decision on the writ would not take nearly as long as an appeal. A swift review was an important consideration since the defendants already had insisted that their speedy trial rights be protected. At all events, we seriously questioned the availability of an appeal, because respondent had based his dismissal, not on the fact that a speedy trial had already been denied, but upon the probability that by the time the effects of the damaging publicity had abated—in his estimation—the defendants would not have been accorded a speedy trial. Presumably, if, contrary to respondent's anticipations, within a reasonable time after dismissal, the community hostility found to be present should abate, he would permit the government to proceed on a new indictment. Since re-indictment was thus not legally barred by the decision, the dismissal could not be treated as a plea in bar.

On November 26, 1969, the court of appeals denied the petition for a writ of mandamus. In its brief decision the Seventh Circuit disagreed with the government's analysis of the availability of an appeal, and held that respondent's decision was a bar to reindictment. Relying upon *Will* v. *United States,* 389 U.S. 90, for the proposition that mandamus is not a sub-

stitute for appeal, the court held that since an appeal was available under 18 U.S.C. 3731, mandamus was inappropriate.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals misapplies the holding in *Will* v. *United States,* and raises important questions regarding the proper use of the writ of mandamus. Evidently the court of appeals regards mandamus as unavailable to the government, whatever the nature of a particular case, if there is a possibility that an appeal might lie. Such a limited construction is at odds with the time-honored concept of mandamus as an extraordinary remedy, to be applied where extraordinary circumstances warrant it. *Will* v. *United States,* 389 U.S. 90, 107–108 (concurring opinion of Mr. Justice Black).[3]

To be sure, the availability or nonavailability of an appeal is taken into account in determining the appropriateness of mandamus. *Will* v. *United States, supra; Ex parte Fahey,* 332 U.S. 258; *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21. And where an appeal does lie, mandamus may not serve simply as a substitute course if its only justification is that it

[3] Although we continue to adhere to our view that mandamus was appropriate in the court of appeals and that an appeal does not lie with this Court, in view of the decision of the Seventh Circuit, coupled with the fact that the awkward problems which faced us in perfecting our appeal prior to this time no longer confront us, we are filing a jurisdictional statement which we regard as protective in nature. That appeal, of course, challenges the merits of respondent's decision, whereas this petition attacks the denial of mandamus.

372-833—70——2

would save time or prevent "judicial inconvenience and hardship." *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379, 383. But where, as here, the extraordinary circumstances which are necessary to invoke mandamus are accompanied by an obligation to preserve the constitutional rights of the defendants to a speedy trial, the process of mandamus is eminently appropriate. The fact that in this case resort to mandamus would have saved time was not just a matter of convenience, but an essential consideration.

There can be little doubt that the dismissal of the indictment in this case was an extraordinary resolution of a unique set of circumstances. Respondent's finding at the outset that a fair jury could not be selected was based upon an erroneous standard, more fully discussed in the jurisdictional statement on appeal filed herewith, and is unsupported by the testimony on voir dire. Compounding the error was respondent's misbelief that he was powerless to take any action to continue the trial or change its situs at all, because of the defendants' refusal to waive their Sixth Amendment rights. In this posture respondent ordered the indictment dismissed. This extraordinary and clearly erroneous resolution of a needless predicament constituted an excess of judicial authority, for respondent premised his dismissal, not on the fact that the defendants had been denied a speedy trial (*i.e.,* an existing state of facts), but on

the ground that the community hostility would remain so intense in the foreseeable future—in his estimation—that by the time a trial by a fair jury was possible, the defendants' speedy trial rights would have been violated (*i.e.*, a set of facts anticipated but not yet known).

Once respondent had announced his decision, it became the duty of the government to expedite the process of review by an appellate court, particularly since the defendants had already demanded a speedy trial. Mandamus, which takes priority over other appellate actions, was the swiftest course. In the situations where the Court has ruled that the inconveniences caused by delay would not justify mandamus (*e.g.*, ***Ex parte Fahey,*** 332 U.S. 258), the attendant delay was little more than a matter of annoyance to the party seeking the extraordinary writ. Here, however, it touches upon the constitutional right to a speedy trial. Moreover, the hazard here was borne not by the petitioner, but by the defendants. The totality of all of these circumstances presented a situation clearly of an extraordinary nature, justifying mandamus whether or not an appeal was also available. See *Will* v. *United States,* 389 U.S. 90, 107–108 (concurring opinion of Mr. Justice Black). At the least, the Seventh Circuit should have reviewed the problems created by this unique setting, rather than

confine its decision to denying mandamus because an appeal was available.[4]

2. But even if the court of appeals properly held that this case should be governed by the general notion that mandamus does not lie where an appeal does, it erred in determining that respondent's dismissal of the indictment could be appealed to this Court as sustaining a plea in bar where no jeopardy had attached (18 U.S.C. 3731). Although we agree that the defendants have not been put in jeopardy by the dismissal (*United States* v. *Celestine,* 215 U.S. 278), we cannot view respondent's order as having then and there ended the cause and exculpated the defendants so that they cannot be tried again. This conclusiveness is necessary to constitute a judgment on a plea in bar. *United States* v. *Blue,* 384 U.S. 251, 254.

Our disagreement arises from the peculiar nature of respondent's order. Having ruled out the options of continuance or change of venue on the strength of defendants' assertion of their constitutional rights to trial in the district and speedy trial, respondent concluded

[4] This factual situation is so manifestly distinguishable from *Will* that the differences need not be discussed in detail. Unlike this case, *Will* dealt with an interlocutory order, which cannot be attacked either by mandamus or appeal until the case is final. Moreover, the government's challenge by mandamus here does not run contrary to the rules stated in *Will* regarding disapproval of piecemeal appeals or possible threat to double jeopardy policies (389 U.S. at 96). Our contention that mandamus lies here, therefore, does not conflict with the Court's view that mandamus "may never be employed as a substitute for appeal in derogation of these clear policies" (*id.* at 97).

that his inability to select a fair jury due to the prevailing atmosphere of prejudice in the community left him no choice but to dismiss the case. Strongly influencing that decision was respondent's determination that a fair jury could not be selected at any time in the future close enough to preserve the defendants' speedy trial rights. However, respondent did not rule that a speedy trial had been denied at the time of the dismissal. Accordingly, the cause was not brought to an end on that basis, and a re-indictment is not barred on the ground that defendants have already been denied a speedy trial.

The problem in this case arises from the fact that, contrary to normal rules of adjudication, respondent dismissed the indictment on an anticipated, rather than an existing, state of facts. Since re-indictment is not legally barred by the decision, we do not believe the dismissal can be treated as the granting of a plea in bar. The order of dismissal, therefore, is not appealable to this Court under 18 U.S.C. 3731.

3. Indeed, the exceptional nature of respondent's order, based as it is upon uncertain future events, provides affirmative support for the appropriateness of mandamus. Since respondent has now expressed himself about what the forseeable future will hold, the government, as a practical matter, faces a severe and unwarranted obstacle to trying the defendants on re-indictment. Respondent's error is not merely in failing to recognize that the right to speedy trial is relative. The error is much more basic—more jurisdictional in character. Respondent has taken present action on a

set of facts which he anticipates but cannot know. For that excess of authority, and for the harm resulting from it, mandamus is the appropriate remedy.

CONCLUSION

This case presents substantial questions of recurring importance not only in the matter of criminal appellate procedures, but in the more fundamental area balancing the protection of the rights of defendants who are the subject of adverse publicity with the right of the people to call upon them in a court of law to answer for their acts. For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

DECEMBER 1969.

APPENDIX A

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

(No. 17977)

Wednesday, November 26, 1969

Before Hon. Roger J. Kiley, Circuit Judge; Hon. Walter J. Cummings, Circuit Judge; Hon. Otto Kerner, Circuit Judge.

Petition for Writ of Mandamus

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE MYRON L. GORDON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN, RESPONDENT

ORDERS

This matter comes to this court on motion of the United States to mandamus Judge Gordon to reinstate the indictment against the defendants Cotton, et al., and briefs and supplemental briefs having been filed by the parties and having heard oral argument,

This court concludes after consideration that since Judge Gordon's dismissal of the indictment was founded on the denial of a speedy trial and further indictment would therefore be barred, and defendants

not having been in jeopardy, appeal to the Supreme Court under 18 U.S.C. § 3731 would be available. Since mandamus is not a substitute for appeal, *Will* v. *United States*, 389 U.S. 90, 96–97 (1967), we find that mandamus is inappropriate in this case.

Wherefore, it is ordered, That the mandamus be and it is hereby denied.

APPENDIX B

United States District Court, Eastern District of Wisconsin

No. 68–CR–113

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD JOSEPH COTTON, JAMES HENDRICKSEN FOREST, ROBERT EDWARD GRAF, JAMES WILLIAM HARNEY, ALFRED LAWRENCE JANICKE, BASIL KENELM O'LEARY, DOUGLAS IAN MARVY, ANTHONY JOSEPH MULLANEY, FREDERICK JOHN OJILE, LAWRENCE EDWARD ROSEBAUGH, DEFENDANTS

Order of Dismissal

Whereas this case came on for trial by jury on June 9, 1969, and

Whereas the court after conducting a voir dire examination of 142 jurors has concluded that because of broad community prejudice an impartial jury cannot be impaneled in this state and this district, and

Whereas the court has determined that the period of time which would be required to pass before an impartial jury might be impaneled would prejudice the rights of these defendants, and

Whereas the defendants have demanded a speedy trial, and

Whereas approximately 10 months have elapsed since the alleged crime,

Now, therefore, IT IS ORDERED, on the court's own motion, that judgment be and hereby is entered dismissing the indictment.

Dated at Milwaukee, Wisconsin, this 11th day of June, 1969.

/s/ MYRON L. GORDON,
U. S. District Judge.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE MYRON L. GORDON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

Page

Argument 1
Conclusion 4, 5

CITATIONS

Cases:

De Beers Consol, Mines, Ltd. v. United States, 325 U.S. 212, 217, 89 L. Ed. 1566, 1572, 65 S. Ct. 1130 (1945) 2

DiBella v. United States, 369 U.S. 121, 130, 7 L. Ed. 2d 614, 620, 82 S. Ct. 654 (1962) 3

Ex Parte Peru, 318 U.S. 578, 588, 87 L. Ed. 1014, 1020, 63 S. Ct. 793 (1943) 2

LaBuy v. Howes Leather Co., 352 U.S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957) 2

Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706, 707, 71 L. Ed. 481, 484, 47 S. Ct. 286 (1927) 2

Maryland v. Soper, 270 U.S. 9, 70 L. Ed. 449, 46 S. Ct. 185 (1926) 2

McCullough v. Cosgrove, 309 U.S. 634, 84 L. Ed. 992, 60 S. Ct. 703 (1940) 2

Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938 (1943) 1

Cases cont'd: Page

Smith v. Hooey, 393 U.S. 374, 378, 21 L.Ed. 607, 89 S.Ct. 575 (1969) 4

United States v. United States Dist. Court, 334 U.S. 258, 92 L.Ed. 1351, 68 S.Ct. 1035 (1948) 2

Will v. United States, 389 U.S. 90, 96-97, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967) ... 1,3

Statutes:

18 U.S.C. 3731 1,4

Miscellaneous:

Annotation, "Accused's Right to Speedy Trial under Federal Constitution - Supreme Court Cases," 21 L.Ed.2d 905 4

ARGUMENT

In its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, the Government presented two questions to this Court:

(1) Whether, in the exceptional circumstances of this case, mandamus was an appropriate remedy for the Government regardless of the availability of an appeal.

(2) Whether the Court of Appeals was correct in determining that Respondent's decision dismissing the indictment against certain defendants was appealable to this Court.

Although Respondent shares the view expressed by the Court of Appeals for the Seventh Circuit that appeal to the Supreme Court would be available to the Government under 18 U.S.C. 3731, thereby answering question No. 2 presented by the Petitioners, Respondent is of the opinion that a denial of certiorari need not be based on that finding alone.

This Court extensively reviewed the law of mandamus in the decision of Will v. United States, 389 U.S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967), where Chief Justice Warren, speaking for the Court, said at Pp. 95 and 96:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938 (1943). While the courts have never confined themselves to an arbitrary and technical definition of

> 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 89 L.Ed. 1566, 1572, 65 S.Ct. 1130 (1945). - Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations.' Ex parte Peru, 318 U.S. 578, 588, 87 L.Ed. 1014, 1020, 63 S.Ct. 793 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations.' Maryland v. Soper, 270 U.S. 9, 70 L.Ed. 449, 46 S.Ct. 185 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, United States v. United States Dist. Court, 334 U.S. 258, 92 L.Ed. 1351, 68 S.Ct. 1035 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, La Buy v. Howes Leather Co., 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957); see McCullough v. Cosgrove, 309 U.S. 634, 84 L.Ed. 992, 60 S.Ct. 703 (1940); Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706, 707, 71 L.Ed. 481, 484, 47 S.Ct. 286 (1927) (dictum)."

By the foregoing review, it clearly appears that the mandamus proceeding is not a vehicle by which this or lesser appellate courts can enunciate new principles of substantive law nor clarify established legal principles.

It rather appears that mandamus should only be employed against a Federal judge when his action is clearly unwarranted.

In this case, the Court of Appeals properly concluded that Judge Gordon's dismissal of the indictment was founded on the denial of a speedy trial, which surely is within his province as a trial judge to do when in the exercise of his discretion such action seems appropriate.

The implication of the first question presented to this Court in these proceedings by the Government seems to be that mandamus would be appropriate in this case even though an appeal from Judge Gordon's dismissal order was available. Respondent conversely urges that mandamus would be inappropriate even if the Government had no right to appeal.

Looking again to Will v. United States, 389 U.S. 90, 96-97, which involved a Government challenge to a trial court's order concerning the provision of a bill of particulars, this Court said:

> "Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal 'made less compelling ... by the fact that the Government has no later right to appeal.' Dibella v. United States, 369 U.S. 121, 130, 7 L. Ed. 2d 614, 620, 82 S. Ct. 654 (1962)." See footnote number 5 (emphasis added).

Petitioner, contrary to the conclusion reached by the Court of Appeals, asserts that Judge Gordon's dismissal was upon a set of facts anticipated but not yet known. As brief comment to that assertion, Respondent points out the highly significant and unique factor in the underlying case to this proceeding of the defendants' imprisonment on June 9, 1969, for a sentence theretofore imposed upon their conviction in a Wisconsin court for state crimes charged upon the incidents constituting

the basis of the Federal charges against them. Thus, Judge Gordon was of the opinion that the defendants would be denied their Constitutional right to a speedy trial if their Federal trial were not held when called on June 9, 1969. See Smith v. Hooey, 393 U.S. 374, 378, 21 L.Ed. 607, 89 S.Ct. 575 (1969); see also Annotation, "Accused's Right to Speedy Trial under Federal Constitution - Supreme Court Cases," 21 L.Ed. 2d 905.

In the conclusion section of the Government's petition in this matter, it is alleged that this case presents substantial questions in the area of balancing the protection of the rights of defendants who are the subject of adverse publicity with the right of the people to call upon them in a court of law to answer for their acts. On that statement of this case alone, mandamus is surely an inappropriate procedural vehicle for appellate court expression.

A litigant, not a court, must chart the course of his litigation. The Government, in this case, inappropriately selected mandamus as a way for appellate review. In the process, Respondent, a trial judge, is made the object of challenge and criticism rather than the rule of law of a case with which the Government disagrees. Such a result reaffirms the wisdom of this Court in narrowly defining the circumstances by which the writ of mandamus will be employed. This case is not one within those circumstances.

CONCLUSION

Mandamus is not a substitute for appeal whether a right to appeal exists or not. If 18 U.S.C. 3731 has meaning, the Court of Appeals for the Seventh Circuit found it to apply in the underlying case to this proceeding. Respondent, a United States trial judge, had discretion to dismiss a criminal action upon his finding a Constitutional infirmity in the proceedings. For the

reasons set forth hereinabove, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRANKLYN M. GIMBEL
Attorney for Respondent

Of Counsel:

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Gerald P. Boyle